

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Kaneohe, Hawaii)

ISLAND HEALTHCARE LIMITED PARTNERSHIP  
d/b/a ALOHA NURSING & REHABILITATION CENTER 1/

Employer

and

MELANIE LEE, An Individual

Petitioner

And

UNITED FOOD & COMMERCIAL WORKERS  
INTERNATIONAL UNION, LOCAL 480, AFL-CIO 2/

**37-RD-346**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 4/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 5/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 6/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 7/

All full-time and regular part-time employees employed by the Employer at its 45-545 Kamehameha Highway facility but excluding working chefs, staffing coordinators, social service assistants, medical records technicians, accounts receivable representatives, business office clerk/receptionists, medical records assistants, executive secretaries, human resources assistants, professional employees, registered nurses, office clerical and confidential employees, guards/watchpersons and supervisors 8/, as defined in the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending

## OVER

immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 480, AFL-CIO**.

## LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii, on or before **October 18, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by **October 25, 2002**.

Dated October 11, 2002

at San Francisco, California

/s/ Robert H. Miller  
Regional Director, Region 20

- 1/ The name of the Employer is in accord with the stipulation of the parties.
- 2/ The name of the Union is in accord with the stipulation of the parties.
- 3/ The only issue to be decided in this proceeding is whether the petition should be dismissed because the Petitioner, Therapeutic Recreation Coordinator Melanie Lee, is a statutory supervisor. By letter dated September 3, 2002, Lee notified the subregional office that she would be unable to attend the hearing held in this matter due to a medical condition, the nature of which is not disclosed in the record. In her September 3, letter, Lee designated Therapeutic Recreation Assistant Sheila Marshall to act as her representative at the hearing. The parties do not dispute that Lee was absent from the hearing because of a medical necessity. However, the Union objected to continuing the hearing in Lee's absence and, at the conclusion of the hearing, sought an adjournment until Lee could be present, arguing that her testimony was crucial to determining her supervisory status. The hearing officer overruled the Union's objection, continued with the hearing without obtaining Lee's testimony, and, over the Union's objection, closed the hearing on the same date. I have treated the Union's motion to adjourn the hearing until Lee could be present as both an objection to the hearing officer's decision to continue the hearing and as a motion to re-open the record in order to take Lee's testimony. For the reasons discussed below, I find that the record evidence is sufficient to determine Lee's status as a statutory supervisor. Accordingly, I decline to reopen the record and I find that the hearing officer did not commit prejudicial error in closing the hearing without obtaining Lee's testimony.

At the hearing, the hearing officer took administrative notice of the "record and file" in Case 37-RC-3927. While I have taken administrative notice of the official record, which includes the transcript and exhibits in that case, I have not taken notice of the contents of the Regional office case file.

- 4/ The parties stipulated, and I find, that the Employer is a Hawaii limited partnership engaged in the operation of a nursing home. During the 12-month period ending July 31, 2002, the Employer derived gross revenues in excess of \$100,000, and purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Hawaii.
- 5/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.
- 6/ No party contends that there is a contract bar to this proceeding.
- 7/ The record reflects that the Union was certified as the exclusive collective-bargaining representative of the unit in Case 37-RC-3927, on October 24, 2000. It is well settled that the unit in a decertification election must be coextensive with the certified or recognized unit. Campbell's Soup Co., 111 NLRB 234 (1955). Accordingly, the

unit appears as described in the Certification of Representative in Case 37-RC-3927.

- 8/ As indicated above, the only issue presented is whether the instant petition should be dismissed because the Petitioner, Therapeutic Recreation Coordinator Melanie Lee, is a statutory supervisor. The Union takes the position that Lee is a statutory supervisor and that the petition must therefore be dismissed. The Employer takes the contrary position.

The Employer's Operation. The Employer is engaged in the operation of a nursing facility at Kaneohe, Hawaii, that provides skilled nursing care, intermediate care and rehabilitative services to approximately 135 to 140 residents. The Employer's operation consists of the following departments: nursing, dietary, facility programs, facility services, maintenance, housekeeping and laundry. The Employer is headed by Executive Director Charles Harris. Its management staff includes Administrator Donna Wong, Assistant Administrator Amy Yamashierr, Director of Nursing Joy Bueno, Director of Human Resources Cy Shimazu, Director of Dietary Department David Koernu, Director of Facility Management M. H. Leon, Facility Programs Director Stephanie Trammel, and Director of Family Services Michelle Contillo.

Facility Programs Director Trammel oversees two programs in which approximately 13 employees work: the adult day wellness program in which eight employees work (called adult day wellness assistants), who provide daycare to approximately 35 to 40 non-residents on a daily basis; and the therapeutic recreation program in which Lee works as the therapeutic recreation coordinator. There are four other employees in this program who are called therapeutic recreation assistants, including Sheila Marshall, Shirley Shiroma, Javiar Guerrero and Wan Tibayan.

Trammel's office is located in the basement of the Employer's facility. She works ten to twelve hours a day, five days a week, and divides her time evenly between the two programs described above. She spends all of her time working within the facility.

The therapeutic recreation program is responsible for scheduling, programming and running events for the 135 to 140 residents of the facility on a daily basis. These events include sing-along groups, sensory outings, various socialization activities, as well as visits by outside groups such as schools or senior citizens organizations, and visiting one-on-one with residents in their rooms to read and socialize with them. Each resident has an individualized care plan that prescribes his or her participation in appropriate recreational activities. Generally there are about ten planned activities conducted each day.

Lee has worked for the Employer for about eight years. The other four therapeutic recreation assistants have worked for the Employer for less time than Lee. Sheila Marshall had worked for the Employer for about seven to eight years and Javiar Guerrero had worked for the Employer for about three months at the time of the hearing. Wan Tibayan transferred into the therapeutic recreation program about a

month and a half before the hearing in this case and had previously worked for the Employer as a Certified Nursing Assistant. The record is silent regarding the length of time Shirley Shiroma has worked for the Employer.

The record discloses that Lee spends about fifty to sixty percent of her work time coordinating and administering activities and about forty percent of her work time running such activities directly with residents. Coordinating activities involves booking entertainment groups, coordinating volunteers and supplies, and generally ensuring that the programs run smoothly. Much of Lee's work time is spent on the phone and the computer in order to handle such tasks. While Lee handles the routine scheduling of events on her own, she must clear any special events with Trammel. Lee also handles the routine ordering of supplies for the program but any orders for supplies from the mainland must be approved by Trammel. The therapeutic recreation program has a budget of \$500 a month for this purpose. Trammel approves the monthly calendar that Lee creates for such events prior to having it typed. As indicated above, Lee spends approximately forty percent of her time working directly with the residents. She is on the daily rotation for weekends and generally works one Sunday a month.

By comparison with Lee's duties, the therapeutic recreation assistants spend varying amounts of their time between performing administrative and hands-on duties. Thus, Sheila Marshall and Shirley Shiroma spend about seventy percent of their time working directly with residents and thirty percent of their time performing administrative tasks. In this regard, the record reflects that Sheila Marshall handles vending supplies, coordinates all hair care for residents, and keeps track of which residents go on which outings. Javier Guerrero spends about ninety percent of his time working directly with residents and about ten percent performing administrative tasks such as coordinating bingo supplies. The other employees in the program bring their supply orders to Lee to handle.

Hiring and Transfers. The record reflects that Trammel has hired five therapeutic recreation assistants. Lee participated in some but not all of the interviews and participated in the transfer interview of Wan Tabayan. Trammel testified that Lee participates in the interview in order to describe to the applicant what the program does and the necessity for being able to drive and work well with groups of people. Trammel generally asks the questions of the applicants during the interview using a written questionnaire. Lee has no authority to make recommendations for hire and has never done so. Other individuals who are not disputed to be supervisors (i.e., Adult Day Wellness Assistants Marical Bimbo and Tambrey Canape) have also participated in hiring interviews for the Employer.

Disciplinary Authority and Evaluations. Trammel testified that she relies on Lee as her "contact" person and they meet daily to discuss the participation of residents in events and how they are doing. According to Trammel, there have been occasions when Lee has reported an infraction committed by an employee and Trammel has followed up on it. Specifically, on one occasion, Lee reported a chronic attendance problem of an employee to Trammel and Trammel disciplined the employee. The

record does not disclose the nature of this discipline. According to Trammel's testimony, Lee has never recommended that disciplinary action be taken against any employee and, moreover, she has no authority to do so.

Evaluations. Trammel prepares the annual evaluations of employees in the therapeutic recreation program. Lee gives input to Trammel regarding employee attendance and at times has attended the meeting where Trammel goes over the evaluation with the employee. However, according to Trammel, Lee's input at these meetings is limited to commenting in a positive manner about the employee and giving input regarding appropriate goals for the employee. No other employees attend the evaluation meetings of their co-workers. However, Trammel does ask other employees how their co-workers are doing.

Timekeeping, Scheduling, Vacations and Overtime. Lee assists Trammel in preparing the weekly schedule for the activities of residents with the program's staff by putting the schedule together and typing it. According to Trammel, other employees who are not disputed to be supervisors, including Adult Day Wellness Assistants Maricel Bimbo and Tambrey Canape, also assist with scheduling in a manner similar to that of Lee for their adult day wellness program. In the therapeutic recreation program, employees are rotated through different assignments/activities and are not assigned based on their abilities at particular jobs. In this regard, Trammel testified that the staff is too small to base assignment decisions on an assessment of an employee's abilities. Rather, assignments must of necessity be based on who is available to handle the task. If an employee is absent or not available to handle a particular activity with residents, then Lee asks another employee to take that employee's place for that event. If no other employee is available, Lee handles the activity herself. Because of the size of the staff, there are no other on-call employees or substitutes that Lee can utilize to handle an absent employee's duties. If additional hours of work are required to cover an absent employee's duties, Trammel must approve such hours. Each day, there is a morning staff meeting of employees in the therapeutic recreation department where employees in the program give their input on the day's assignments and scheduled events. Trammel and Lee both attend this meeting along with the other therapeutic recreation assistants.

When employees are absent or late for work, they must contact Trammel or Lee. If they call Lee, she notifies Trammel. Lee verifies time records and corrects discrepancies when a therapeutic recreation assistant fails to punch out or when other timekeeping mistakes are made. In correcting such discrepancies, Lee fills out a form, which must be approved by Trammel before the employee is paid for the time. Lee also prepares an employee attendance report using computerized time sheets. Trammel uses this report in preparing employee evaluations. Vacation scheduling and approval of overtime must be approved by Trammel.

Substitution for Trammel. Lee substitutes for Trammel when she is absent or unavailable and sometimes attends the daily quality assurance meeting and

Wednesday care plan meetings which are generally attended by supervisors and/or managers. Lee does not attend management meetings dealing with personnel issues even when Trammel is absent. In Trammel's absence, Lee handles matters pertaining to activities with residents and Wong handles personnel matters. There is no evidence that Lee has taken any personnel actions in Trammel's absence.

Access to Employee Files. Employee files are kept in Trammel's office and Lee has no access to them.

Pay and Benefits. Lee earns \$12 an hour; Sheila Marshall earns \$11.50 an hour; Shirley Shiroma earns \$11 an hour; Javier Guerrero and Wan Tabayan each earn \$8.50 an hour. Lee receives the same fringe benefits as other employees.

Offices. Lee shares an office with Shirley Shiroma located on the first floor of the Employer's facility that contains a desk, computer and a telephone. Sheila Marshall, Javier Guerrero and Wan Tabayan share an office on the second floor of the facility. All of the employees in the therapeutic recreation program have a key to Lee's office and use the computer and telephone in that office.

Uniforms. The Employer has no required uniform and many of its employees wear hospital scrubs. Employees wear badges with their names and titles on them and Lee's badge has her job title on it.

Analysis. As indicated above, the Union contends that the petition must be dismissed on the basis that Lee is a statutory supervisor and the Employer takes the opposite position.

The term "supervisor" is defined in Section 2(11) of the Act as:

"[A]ny individual having authority, in the interest of the Employer-Petitioner, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986) An individual who exercises some "supervisory authority" only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status

too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, *supra*; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers." *Oil Workers v. NLRB*, *supra*, at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, I find that the evidence does not establish that Lee is a statutory supervisor. There is no evidence that she possesses or exercises any of the powers enumerated in Section 2(11) of the Act or that she effectively recommends actions in these areas. Thus, there is no evidence that Lee hires or fires employees or effectively recommends such actions. In this regard, Lee's participation in employee interviews is insufficient to warrant a finding that she is a statutory supervisor as it appears that her participation in the interview is limited to describing the Employer's therapeutic recreation program to applicants. Similarly, the evidence regarding Lee's participation in the evaluation process reflects that her input in the evaluation is limited to commenting about the employee in a positive manner and providing input regarding setting goals for the employees. There is no evidence that Lee makes any recommendation with regard to the scoring of the evaluation or the outcome of the evaluation. Nor is there any evidence that she makes any recommendations as to whether employees should receive wage increases or other remuneration. The fact that Trammel relies on Lee to report attendance problems or that Lee keeps and verifies attendance records is not sufficient to warrant a finding that she is a statutory supervisor.

Nor does the record establish that Lee's involvement in putting together the monthly schedule of activities for the therapeutic recreation program is done with independent judgment, given that she and Trammel work on this schedule together; that Trammel



approves it; that there are only a small number of employees in the program to be scheduled; and that because of the small size of the staff, assignments must be based on who is available on a given day and not on who is better suited to handle a particular task. Similarly, I do not find that Lee's ability to handle making routine orders of supplies for the therapeutic recreation program under a pre-established budget warrants a finding that she is a statutory supervisor. I further note in this regard that Trammel must approve all orders requiring shipments from the mainland.

With regard to the fact that Lee substitutes for Trammel when Trammel is on vacation or absent from the facility, the record shows that her authority during this period is limited to matters involving scheduled activities with residents and that Administrator Wong handles personnel matters in Trammel's absence. Thus, there is no evidence that Lee has exercised even sporadic authority under Section 2(11) of the Act on such occasions.

Furthermore, I note that if Lee were found to be a statutory supervisor, there would be two supervisors overseeing four employees in the therapeutic recreation program. This would be an extremely high ratio of supervisors to employees even taking into account that Trammel also oversees the eight adult wellness care assistants in another program. Finally, Lee's regular performance of hands-on work with residents supports a finding that her role is more in the nature of a lead person than that of a statutory supervisor, given Lee's reporting and assisting role to Trammel who is involved in the program on a daily basis and who makes the actual decisions on personnel matters.

In sum, I find that the evidence does not establish that Lee is a statutory supervisor. Nor do I find it necessary to have Lee testify given the testimony of her immediate supervisor Trammel who is involved on a daily basis with Lee and the employees and who is in an excellent position to assess Lee's supervisory authority.

In view of the foregoing, I find that Lee is not excluded from the unit as a statutory supervisor and I decline to dismiss the petition on this basis.

177-8501-2000-0000  
177-8520-2400-0000  
177-8520-0800-0000







